86-121

Supreme Court, U.S.
FILED
JUL 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

RECORD NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

ASHTON HARRIS PULLY, JR.,

Petitioner.

PETITIONER FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

SHOULD THE INDICTMENT HAVE BEEN DISMISSED AS THE DEFENDANT WAS NOT BROUGHT TO TRIAL WITHIN THE TIME MANDATED BY THE SPEEDY TRIAL ACT, 18 U.S.C. §3161(c)?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	4
ARGUMENT	9
CONCLUSION	22
APPENDIX	

TABLE OF AUTHORITIES

	Page
Cases	
Banker's Life and Casualty Co. v. Holland, 346 U.S. 379, 98 L.Ed. 106, 74 S.Ct. 145 (1953)	17
Bartsch v. Clarke, 293 F.2d 283 (4th Cir. 1961)	17
Ex parte Fahey, 332 U.S. 258, 91 L.Ed. 2041, 67 S.Ct. 1558 (1947)	18
Ex parte Rowland, 104 U.S. 604, 26 L.Ed. 861 (1882)	18
Pollard V. Osteen, 487 F.2d 1398 (4th Cir. 1973)	17
Roche v. Evaporated Milk Assn., 319 U.S. 21, 87 L.Ed. 1185, 63 S.Ct. 938 (1943)	18
United States v. Alkali Export Assn., 325 U.S. 196, 89 L.Ed 1554, 65 S.Ct. 1120	18
United States v. Black, 733 F.2d 349 (4th Cir. 1984)	19
United States v. Rojas-Contreras, ____ U.S. ____, 88 L.Ed. 2d 537, 106 S.Ct. 555 (1985)	18

Page

Statutes

18 U.S.C. §3161	9,17,20,21
18 U.S.C. §3161(c)	3
18 U.S.C. §3161(c)(1)	1,6,8,9
18 U.S.C. §3161(h)	3
18 U.S.C. §3161(h)(1)	2,10,11
18 U.S.C. §3161(h)(1)(E)	2,7,8,11,20,21
18.U.S.C. §3161(h)(1)(F)	2,6,7,9,12,14
18 U.S.C. §3161(h)(1)(J)	3,6,7,8,11,14,15,17,20
18 U.S.C. §3161(h)(3)	3
18 U.S.C. §3161(i)	3,6,12
18 U.S.C. §3162(a)(2)	3,22
18 U.S.C. §3231	4

Other Authorities

28 U.S.C. 1254(1)	1

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fourth Circuit, Case No. 85-5178, of which review is sought here, was delivered on April 2, 1986. The Judgment and Probation/Commitment Order of the United States District Court for the Eastern District of Virginia, Norfolk Division, Docket No. CR. 84-4-N, was issued on July 11, 1985. The unpublished decision of the United States Court of Appeals for the Fourth Circuit, denying Petition for a Writ of Mandamus, Case No. 84-1721, was delivered on February 7, 1985.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. §3161(c)(1) provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

18 U.S.C. §3161(h) provides in pertinent part:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
>
> * * *
>
> (E) delay resulting from any interlocutory appeal;
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of

the hearing on, or other prompt disposition of, such motion;

* * *

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

18 U.S.C. §3161(i) provides:

If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161 on the date the order permitting withdrawal of the plea becomes final.

18 U.S.C. §3162(a)(2) provides:

If a defendant is not brought to trial within the time limit required by section 3161 (c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall

> consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

STATEMENT OF THE CASE

The Petitioner filed for personal bankruptcy on October 26, 1979. On January 9, 1984, Pully was indicted by the grand jury for the Eastern District of Virginia on six counts of bankruptcy fraud. Jurisdiction of the Federal District Court was invoked under 18 U.S.C. §3231. Count 1 charged that Pully had fraudulently concealed and failed to disclose his interest in several pieces of real estate. Count 2 charged him with a fraudulent conveyance of real estate in contemplation of bankruptcy. Counts 3 through 6 charged Pully with knowingly and fraudulently

making material false statements under penalty of perjury as to matters relating to his bankruptcy case.

In order to clarify the periods properly included in computing the time within which the trial of this matter must have commenced under the Speedy Trial Act, the following recitation of dates and events is provided.

OUTLINE OF PERTINENT DATES:

1. January 9, 1984: The indictment against Pully is filed in open court. (App. p. 2)

2. March 19, 1984: Pully enters a plea of guilty in open court. (App. p. 2)

3. May 25, 1984: Pully moves to withdraw his guilty plea. (lodged) (App. p. 2)

4. June 4, 1984: Pully moves to dismiss the indictments (sic) on grounds of lack of jurisdiction, res judicata, and collateral estoppel. (lodged) (App. p. 2)

5. June 5, 1984: Pully's motion to dismiss is denied. The motion to withdraw guilty plea is granted; all motions heretofore lodged are filed at direction of court. Clock begins to run. 18 U.S.C. §3161(i) and 3161(c)(1). (App. p. 3)

6. June 14, 1984: Defendant lodges a motion to stay the proceedings and attempts to file a notice of appeal to the decision of June 5, 1984; however, the court refuses to allow the notice to be filed by the clerk and merely permits it to be lodged. Clock continues to run. 18 U.S.C. §§3161(h)(1)(F) and 3161(h)(1)(J) do not apply. (App. p. 6)

7. June 15, 1984: By order filed this date (but entered June 14, 1984), the court rules that its decision of June 5, 1984 is not final and therefore is not appealable. Pully submits notice of appeal. Clock continues to run. 18 U.S.C. §§3161(h)(1)(F) and 3161(h)(1)(J) do not apply.

(App. p. 6)

8. June 29, 1984: Pully attempts to file a second motion to stay the proceedings, but the court again refuses to file the motion, merely permitting it to be lodged. Clock continues to run. 18 U.S.C. §§3161(h)(1)(F) and 3161(h)(1)(J) do not apply.

9. July 6, 1984: The court orders the second notice of appeal lodged but refuses to allow it to be filed. The motion to stay the proceedings lodged June 29, 1984 is ordered filed and same is denied by the court. Clock stops for this day only. 18 U.S.C. §3161(h)(1)(F). (App. p. 8)

10. July 9, 1984: Defendant petitions the Court of Appeals for the Fourth Circuit for a writ of mandamus. Clock continues to run. 18 U.S.C. §3161(h)(1)(E) does not apply. (App. p. 12)

11. July 11, 1984: Pully submits a motion for pre-trial discovery of grand jury proceedings.

(lodged) Clock continues to run. 18 U.S.C. §3161(c)(1).

12. July 13. 1984: The Fourth Circuit Court of Appeals orders that the trial be stayed until further order. Clock continues to run. 18 U.S.C. §3161(c)(1). (App. p. 3)

13. August 8, 1984: End of 30 day period excludable under 18 U.S.C. §3161(h)(1)(J). Clock continues to run.

14. March 28, 1985: The Fourth Circuit Court of Appeals lifts stay of proceedings and denies the petition for a writ of mandamus by advance opinion. (App. pp. 16-18) Clock continues to run. 18 U.S.C. §3161(h)(1)(E) does not apply.

15. April 15 1985: Pully's motion for stay of mandate pending application for certiorari from the Supreme Court is filed with the Fourth Circuit. Clock continues to run. 18 U.S.C. §3161(c)(1).

16. April 16, 1985: The motion for stay is denied by Court of Appeals for the Fourth Circuit. (App. p. 47) Clock continues to run. 18 U.S.C. §3161(c)(1).

17. April 19, 1985: The Court of Appeals' mandate issues. Clock continues to run. 18 U.S.C. §3161(c)(1). (App. p. 4)

18. June 3, 1985: Defendant files a motion to dismiss indictment, alleging a violation of the Speedy Trial Act. Clock stops running. 18 U.S.C. §3161(h)(1)(F). (App. p. 4)

19. June 4, 1985: Pully's trial commences after the district court denies the motion to dismiss. (App. p. 4)

ARGUMENT

By misapplying provisions of the Speedy Trial Act, 18 U.S.C. §3161, the Court of Appeals for the Fourth Circuit erroneously concluded that only 58 of the 70 days permitted under the Act had run

(App. p. 38), when in fact 361 countable days had elapsed between the indictment and the trial, 291 too many. (App. pp. 46-49)

Specifically, the Court of Appeals made the following miscalculations:

1. The court improperly excluded periods of delay under the Speedy Trial Act, 18 U.S.C. §3161(h)(1), by erroneously characterizing as "filed" certain motions of the Accused that were merely submitted to the district court and either lodged or not received at all. (App. pp. 32, 33, 35, 36)

2. The court improperly excluded periods of delay under §3161(h)(1) of the Act by concluding that certain of Pully's motions, although not filed with the district court, were under advisement, notwithstanding the fact that the clarifying order of the district court does not mention, nor does the clerk's docket indicate, that said

motions were ever under advisement. (App. p. 36)

3. The court improperly excluded a period of delay under §3161(h)(1) of the Act by finding a petition for a writ of mandamus identical to an interlocutory appeal for the purpose of applying Section 3161(h)(1)(E) of the Act, which tolls the Act during delays resulting from interlocutory appeals. (App. pp. 37, 38)

4. The court improperly excluded a period of delay under §3161(h)(1) of the Act by excluding the entire period during which it had the Defendant's petition for a writ of mandamus under advisement, rather than the maximum of thirty days which is permitted by the Act, §3161(h)(1)(J).

The Petitioner agrees with the Fourth Circuit that the starting date for computing time under the Speedy Trial Act is June 6, 1984, the day after the district court allowed Pully to withdraw his plea of guilty. (App. p. 35) The period from

the date of the indictment, January 9, 1984 through June 5, 1984 is not considered excludable delay under the provisions of the Act. 18 U.S.C. §3161(i).

However, the Fourth Circuit improperly excluded four other periods of time in calculating the time between indictment and trial: July 13 and 14 of 1984; June 16 to July 6 of 1984; July 9 through August 8 of 1984; and August 9, 1984 to April 19, 1985.

With respect to the first period, June 13 and 14, 1984, the Fourth Circuit failed to recognize the critical difference between the "filing" of motions and the "lodging" of motions. (App. pp. 32, 33, 35, 36) The Speedy Trial Act only allows exclusion of time periods commencing with the "filing" of motions. 18 U.S.C. §3161(h)(1)(F) Unless filed, a motion is neither properly before nor considered by a district court.

The Defendant did not file a motion to stay further proceedings on June 13, 1984 as stated on pages five and nine of the Court of Appeals opinion. (App. pp. 32, 36) The district court clerk's docket shows no such entry on June 13, 1984. (App. pp. 2-3) The motion itself does not display a written designation of having been lodged, much less filed with the court. The clerk's June 15, 1984 entry on the docket and the district court's order of June 15, 1984 specifically state that the notice of appeal was lodged rather than filed. (App. pp. 3, 6-7)[1/] Contrary to the opinion of the Court of Appeals, there is absolutely no indication from the face of the

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1/ The June 15, 1984, order was actually drafted and signed on June 14, 1984. Its text indicates that Pully "has now lodged a notice of appeal" of the June 5, 1984 order which logically illustrates that this notice was lodged on June 14, 1984, not June 13, 1984 as the Court of Appeal's opinion states

docket or the district court's order of June 15, 1984, that any of the proceedings were taken under advisement by the district judge. (Opinion pp. 8-11; App. pp 3, 6-7) Consequently, June 14 should not be excluded from computation under the Speedy Trial Act. Subsections (h)(1)(F) and (h)(1)(J) of 18 U.S.C. §3161 do not apply.

The Court of Appeals also improperly excluded June 16 through July 5, 1984 from its computations. The Fourth Circuit opinion incorrectly states on pages six and nine that the Defendant "filed" another appeal and another motion to stay, referring to the appeal submitted on June 15 and the motion submitted on June 29. (App. p. 33, 36) Once again, there are absolutely no entries on the docket reflecting these assertions, and the notice of appeal bears no marking to indicate that it was filed or lodged. (App. p. 3) The opinion goes on to state that the district judge had the motion to

BEST AVA

stay "under advisement" until his order of July 6, 1984 and that this time is excludable under §3161(h)(1)(J). (App. p. 36) The motion to stay does not appear as an entry on the trial court's docket (App. p. 3) and states on its face that it was "lodged - 6-29-84" and not filed. Presumably, the clerk of the district court made this entry. The handwritten notation of the district judge states that the motion to stay further proceedings was on "7-6-84 filed by Court (and) denied (by) John A. McKenzie (,Judge)." There is absolutely nothing in the district court's order of July 6, 1984, to show that the motion was under advisement until that date. The order merely states that "(a) hearing was held on this matter on July 6, 1984." (App. pp. 8-11) Nothing supports the statement on page nine of the Fourth Circuit's opinion that the motion to stay was ever under advisement. Indeed, district court Judge McKenzie

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stated that, "Defendant next submitted a notice of appeal from the June 15, 1984 Order of this Court, as well as a second motion for a stay. At this point, the clerk was directed to refuse this submission because the notice and motion were not endorsed by Defendant's counsel of record." (App. p. 9) The district court thus explicitly acknowledged that the matter was not under advisement and that the notice of appeal and motion to stay were simply submitted by the Defendant but refused by the clerk at the direction of the trial judge.

The July 6th order also says that the second notice of appeal was simply ordered lodged on July 6, 1984 and not filed. (App. p. 8) It is therefore abundantly clear that the period from June 15, 1984 until July 6, 1984 is not excludable under any provision of the Speedy Trial Act, and is specifically not excludable under 18 U.S.C.

§3161(h)(1)(J).

The third span of time in controversy lies between July 9, 1984 and March 28, 1985. This period is clearly not excludable under any provision of 18 U.S.C. §3161. Yet the Fourth Circuit excluded this period from its pretrial time computation based on its belief that, under the Speedy Trial Act, a petition for a writ of mandamus is an interlocutory appeal.[2/] (Opinion pp.

2/ Both the Fourth Circuit and this Court have previously recognized the distinction between a writ of mandamus and an interlocutory appeal. Mandamus may not be ordinarly resorted to as a mode of review when a statutory method has been prescribed. The writ may not be used as a substitute for an appeal and it may not be used as a means for obtaining review of an order of the trial court which is not appealable because it does not constitute a final determination of the case. Pollard v. Osteen, 487 F.2d 1398 (4th Cir. 1973); Bartsch v. Clarke, 293 F.2d 283 (4th Cir. 1961). It is well established that the extraordinary writ of mandamus cannot be used as a substitute for appeal. Banker's Life and Casualty Co. v. Holland, 346 U.S. 379, 98

10-11) Such a characterization effectively rewrites the Speedy Trial Act to exclude from computation delay caused by a judicial proceeding nowhere mentioned in the text of the statute. The court's analysis is at odds with customary standards of statutory interpretation. As Mr. Justice Blackman stated in his concurring opinion in United States v. Rojas-Contreras, _____ U.S. _____, 106 S.Ct. 555, 559, 88 L.Ed.2d 537 (1985), "[t]he Act's comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered

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2/ (continued)
L.Ed. 106, 74 S.Ct. 145 (1953); Ex parte Fahey, 332 U.S. 258, 91 L.Ed. 2041, 67 S.Ct. 1558 (1947). This is true even though hardship may result from delay and perhaps unnecessary trial. United States v. Alkali Export Assn., 325 U.S. 196, 89 L.Ed. 1554, 65 S.Ct. 1120 (1945); Roche v. Evaporated Milk Assn., 319 U.S. 21, 87 L.Ed. 1185, 63 S.Ct. 938 (1943). Whatever may be done without the writ may not be done with it. Ex parte Rowland, 104 U.S. 604, 26 L.Ed 861 (1882).

judgment that those periods are to be included in the speedy trial calculation, or as a recognition that the need for such an exclusion will not arise under the statutory scheme."

Mr. Justice Black's view has received at least tacit support by the Chief Judge of the Fourth Circuit. Chief Judge Winter's dissent in United States v. Black, 733 F.2d 349 (4th Cir. 1984), contains the following admonition: "By enacting the Speedy Trial Act, Congress has guaranteed certain rights to an accused, one of which is the right to be (tried) within seventy days unless proper proceedings delaying (the trial) are pending. It ill behooves the government or this court to subvert this clear expression of legislative intent." 733 F.2d at 353. Clearly, a petition for a writ of mandamus is not an interlocutory appeal. Nowhere in the Speedy Trial Act is there a recognition of excludable delay

where a defendant petitions an appellate court to grant a writ of mandamus.

Four days after receiving Pully's Petition for a Writ of Mandamus, the Court of Appeals stayed the district court proceedings. (App. p. 3) This stay was ordered in conjunction with a separate civil action, In re Ashton Harris Pully, Jr., No. 84-1721, and is therefore not excludable under any provision of 18 U.S.C. §3161.

The fourth period of time which the Fourth Circuit improperly excluded from its computations was from August 9, 1984 to April 19, 1985. Even assuming, arguendo, that a petition for writ of mandamus is an interlocutory appeal and thus comes under the provisions of 18 U.S.C. §3161(h)(1)(E), only thirty days during which the writ of mandamus was actually under advisement by the court is allowed as excludable delay, 18 U.S.C. §3161(h)(1)(J). Therefore, the speedy trial

"clock" began to run again on August 8, 1984, 30 days after the petition for writ of mandamus was filed, until June 2, 1985, the day before the motion to dismiss was filed. (App. p. 4)

Properly construing 18 U.S.C. §3161, 363 days elapsed between the time of Pully's indictment and the time of his trial. Assuming, arguendo, that a petition for writ of mandamus is an interlocutory appeal for purposes of 18 U.S.C. §3161(h)(1)(E), 100 countable days ran between Pully's indictment and trial.

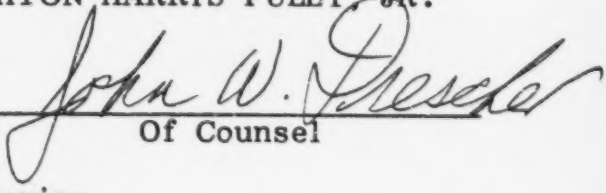
By either method of calculation, the government has failed to bring the accused to trial within the seventy day period mandated by the Speedy Trial Act. The motions critical to this petition, identified as having been "filed" in the Fourth Circuit opinion, were not filed. Motions not "filed" cannot reasonably be held to have been under advisement. A petition for writ of mandamus

is not an interlocutory appeal. Finally, only 30 days of delay caused by a court taking a proceeding under advisement may be excluded from speedy trial computation. Pully's convictions should be reversed and dismissed by the district court with or without prejudice. 18 U.S.C. §3162(a)(2).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

ASHTON HARRIS PULLY, JR.

By 
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APPENDIX

APPENDIX
TABLE OF CONTENTS

	Page
Five page Docket Sheet from the United States District Court	1
Order dated June 14, 1984 Declining Notice of Appeal and Denying Defendant's Motion to Stay Further Proceedings	6
Order dated July 6, 1984, Ordering June 15, 1984 Notice of Appeal Lodged but neither Notice of Appeal filed and Motion to Stay Further Proceedings denied	8
Petition for Writ of Mandamus	12
Opinion dated March 28, 1985 of the United States Court of Appeals for the Fourth Circuit denying Petition for Writ of Mandamus and lifting the stay of further criminal proceedings	16
Excerpts of Transcript of Proceedings on June 4, 1985 in the United States District Court for the Eastern District of Virginia, Norfolk Division at Norfolk, Virginia, including the ruling of the Honorable Robert G. Doumar, United States District Judge, denying defendant's speedy trial motion	19
Judgment and Probation Commitment Order dated July 11, 1985	23

Page

Opinion dated April 2, 1986 of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the trial court 28

Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing filed 5/27/86 45

Speedy Trial Chronology 47

PO ☐ Mist. ☐ Felony ☒ | 0422 02 2298 (Assigned Case Number) | District | Off | Judge/Magistr.

N WRIT / N JUVE / N ALIAS — OFFENSE ON INDEX CARDS

VS. • PULLY, ASHTON HARRIS, JR.

DOC 01 | DOV 09 | 84 CR.84-00004-(| No. of Def's 1 | U.S. MAG. CASE NO. ▶

I. CHARGES

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS	DISM.	CONVIC.
T.18:152	Bankruptcy Fraud (6 counts)	6	1 NG	GUILTY

SUPERSEDING COUNTS ☐ JURY ☐ N.J.

II. KEY DATE

INTERVAL ONE	START CLOCK AND/OR BEGIN TWO (OR) RESTART PERIOD TO TRIAL	INTERVAL TWO
KEY DATE ▶ EARLIEST OF	KEY DATE 1-09-84 APPLICABLE	KEY DATE 1-18-84 LATEST OF
		KEY DATE 6-4-85 APPLICABLE

1st appears with or waives counsel	ARRAIGNMENT	1st Trial Ended	RE-TRIAL	2nd Trial Began	DISPOSITION DATE	SENTENCE DATE	FTD Rule / Proc.	FINAL CHARGES DISMISSED
1-18-84	1-18-84	6-7-85			6-7-85			on S.T. grounds ☐ W.P. ☐ WOP

III. MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT ▶			

INITIAL APPEARANCE DATE ▶ — INITIAL/NO.

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled ▶ / Date Held ▶

☐ WAIVED ☐ NOT WAIVED — Time Number

☐ INTERVENING INDICTMENT

OUTCOME: ☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

Date of Arrest	OFFENSE (In Complaint)

Show last names and suffix numbers of other defendants on same indictment/information:

RULE 20 ☐ 21 ☐ 40 ☐ In ☐ Out ☐

IV. NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC.

ATTORNEYS — U. S. Attorney or Asst.

Michael A. Cauley, AUSA

Defense: 1 ☐ CJA. 2 ☐ Ret. 3 ☐ Waived. 4 ☐ Self. 5 ☐ Non / Other. 6 ☐ PD. 7 ☐ CD

John Drescher, Esq.
Attorney at Law
101 N. Lynnhaven Rd.
Va. Beach, VA.

BAIL • RELEASE

PRE-INDICTMENT

Release Date | Bail Denied | Fugitive | Pers. Rec. | PSA | AMOUNT SET $ | Date Set | Bail Not Made | Date Bond Made | Conditions: 10% Dep. | Surety Bd. | Collateral | 3rd Pty | Other

POST-INDICTMENT

Release Date | Bail Denied | Fugitive | Pers. Rec. | PSA | AMOUNT SET $ | Date Set | Bail Not Made | Date Bond Made | Conditions: 10% Dep. | Surety Bd. | Collateral | 3rd Pty | Other

APPEALS FEE PAYMENTS

Docket Entries Begin On Reverse Side

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER
7/6/84	Rec #88228	$70.00 Appeal Fee			

BEST AVAILABLE COPY

DATE | Vol I | CR.84-4-N | MASTER DOCKET - MULTIPLE DEFENDANT CASE / PROCEEDINGS DOCKET FOR SINGLE DEFENDANT (PULLY) | PAGE 1 OF 1

DATE	DOCUMENT NO.	V. PROCEEDINGS	VI EXCLUDABLE DELAY: Start Date / End Date	Up Code	Total Days
1984					
Jan. 9	1	INDICTMENT RETURNED AND FILED IN Open Court.			
Jan. 9	-	ARRAIGNMENT NOTICE mld. (set:1-18-84)			
Jan. 18		COURT PROCEEDINGS (JAM, Judge) (R. Zahn, OCR) - U. S. appeared through Tommy Miller, AUSA. Deft. pres. with his atty., John Drescher. Came on for arr. Copy of Indict. prev. furn. to deft. Deft. waived formal arr. and plead not guilty. Jury demanded. Prel. motions to be filed by 2-3-84. Set for trial on 3-20-84 w/Jury. Waiver of appearance form furn. and filed.			
	2	Bond set at $25,000 P.R. Deft. may travel to Colorado for 10 days.			
Jan. 18	3	COURT APPEARANCE BOND in the amt. of $25,000 exec. by deft. on his own pers. recog., filed.			
Jan. 18	4	ORDER specifying methods & conditions of release, exec. ent. and filed; JAM, Judge. Dist.	1-18-84	E	
Jan. 18	5	DEFT'S MOTION for discovery and inspection filed.			
Feb. 3	6	GOVT'S MOTION FOR DISCOVERY filed.			
Feb. 3	7	DEFT'S MOTION to dismiss filed.			
Feb. 6	8	BRIEF in support of motion to dismiss received.			
Feb. 8	9	GOVT'S ANSWER TO Deft's Motion for Discovery, filed.			
Feb. 10	10	DEFT.'S ANSWER to Govt. Motion for Discovery filed.			
Feb. 16	11	GOVT.'S ANSWER to Dismiss filed & Brief in Support thereof rec'd.			
Mar. 7	12	(5) APPLICATIONS for Subpoenas Duces Tecum to be issued filed.			
Mar. 7	13	ORDER DIR. ISSUANCE OF SUBPOENAES DUCES TECUM returnable to the Clerk's Office on 3-14-84 at 2:00 p.m., ent. & filed; JAM, Judge. (Subpoenaes iss. and copies attached and del. to Msh)			
Mar. 13	14	DEFT'S MOTION for Pre-Trial Disclosure of Evidence Pursuant to Rule 404(b) of the Federal Rules of Evidence, filed			
Mar. 13	15	DEFT'S REPLY BRIEF in Support of Motion to Dismiss, received.	3-14-84	E	56
Mar. 14		COURT PROCEEDINGS (JAM) - U. S. appeared thru Mr. Michael Cauley, AUSA. Deft. not present having heretofore filed waiver of appearance. Mr. John Drescher and Mr. James Lewis appeared on behalf of deft. Came on for hearing on pending motions. Deft. motion to dismiss cts. 3,4,5 and 6 DENIED. Govt. to furnish Jencks material by Friday, 3/16/84 at 3 P.M.			
Mar. 19		COURT PROCEEDINGS (JAM) - U.S. appeared thru Michael Cauley, AUSA. Deft. pres. w/counsel John Drescher & James Lewis. Came on for further proceedings. Court reviewed previous proceedings; comments of counsel and Court heard. Plea agreement			
	16	read into record and filed in Open Court. Deft. plead GUILTY as to Ct. 2. Ct. inq. re vol. of plea; expl. charge; inq. re plea bargaining; inq. re threats or promises; expl. max. penalty; expl. to deft. that by pleading guilty he waived jury trial. Deft. satisfied with services of counsel. Plea of guilty as to Ct. 2 accepted by Court. Govt. pres. factual basis of its case thru summary by Mr. Cauley. Court finds deft. guilty as to Ct. 2. Cont'd for pre-sentence report. Deft. cont'd on pres. bond. Court cautioned deft. re bail jumping. NOTE: Govt. to dismiss remaining counts at later time.			
Apr. 26		TRANSCRIPT of proceedings before John A. MacKenzie, Chief Judge (3-19-84) rec'd. & filed.			
June 5		COURT PROCEEDINGS (JAM)(K. Vermillian, Ct. Rptr.)- U.S. appeared thru Michael A. Cauley, AUSA. Deft. pres. with counsel, John Drescher & James Lewis. Came on for hearing on deft.'s motion to withdraw plea of guilty & motion to dismiss. Deft. elected to argue his own case. Arguments of deft. & Mr. Cauley heard. Motion to withdraw plea of guilty GRANTED	6-5-84	U	

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs PUL , ASHTON HARRIS, JR.

CR. 84-4-N
Yr. | Docket No.

DATE 1984	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DE (a)	(b)	(c
	(cont.) Motion to dismiss - OVERRULED. Trial to proceed on all six counts. Trial reset 7-17-84 with Jury. Deft. waived		6-5-84	E
	17 formal re-arraignment. Motions heretofore lodged Filed at the direction of the Court. (Group of documents re bankruptcy proceeding rec'd as Deft. Exh. #1.			
June 15	18 ORDER DECLINING to allow an appeal of the interlocutory order of June 5, 1984 and dir. that the Notice of Appeal will not be filed; denying deft's motion to stay further proceedings pending appeal; ent. 6/14/84 and filed; JAM. Copies to U. S. Atty and to Mr. Drescher by Judge's office. Copy to Mr. Pully and return of his $70.00 check - in person.		-	
July 3	TRANSCRIPT of proceedings before the Court on 6-5-84 recd. & filed.			
July 6	COURT PROCEEDINGS (JAM, Judge) (R. Zahn, OCR) -U. S. appeared thru Mr. Michael Cauley, AUSA. Deft. pres. with his counsel, Mr. John Drescher and James Lewis. Matter came on for further proceedings. Deft's Motion to Stay filed by			
	18A the Court. Mr. Drescher & Mr. Lewis' Motion to Withdraw		7-6-54	E
	18B as counsel filed by the Court. Court will prepare order pur. to ruling from Bench re Notice of Appeal, etc. MATTER TO GO TO TRIAL AS SCHEDULED.			
July 6	19 ORDER re hearing on July 6, 1984 - order supersedes and clarifies oral rulings made at the hearing ... order directs that deft. may pursue pro se his attempt to appeal from the denial of his motion to dismiss & therefore the second Notice of Appeal is Lodged; the Court further adheres to its prior ruling that the 6/5/84 denial of deft's motion to dismiss was not a final order and thus neither decision is currently appealable and neither notice of appeal will be filed ent. & filed; JAM, Judge. Copies to counsel and deft. by Judge's office; o.b.		*	
July 16	20 ORDER recd. from U. S. Court of Appeals STAYING criminal case until further order of Court of Appeals; dir. U. S. to respond to deft's application for mandamus within 10 days from 7-13-84; filed. Copies to Mshl., U. S. Atty., P.O. and defense counsel;o.b.		7-13-84	
Aug. 3	21 ORDER granting deft. permission to leave E.D. of Va. and travel to area of Los Angeles, Calif. from 8-5-84 and returning no later than 8-14-84 ent. & filed; JAM, Judge.			
Dec. 7	22 COPY OF ORDER recd. from U.S. Court of Appeals establishing following brief & oral argument schedule: (1) deft. shall serve & file his brief & joint app. by 12-31-84; (2) Govt. shall serve & file its brief by 1-21-85; (3) deft.'s reply brief, if any, shall be served & filed in office of Clerk by 1-29-85; & (4) case is tentatively calendared for Feb. term of Court, & filed. Copies to U.S. Atty., deft., Mshl. & J. Drescher.			
1985 Mar. 29	23 ADVANCED OPINION recd. from U. S. Court of Appeals denying deft's petitions for Writ of Mandamus and lifting the stay of further criminal proceedings recd., filed.			
1985 April 17	24 ORDER recd. from U. S. Court of Appeals denying deft's motion for stay of mandate pending application for certiorari, filed.		4-- 85	

Interval (per Section II) | Start Date / End Date | Ltr. Cod

AO 256A

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE 1985	(Document No.)	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
Apr. 19	25	OPINION recd. from U. S. Court of Appeals denying deft's petitions for Writ of Mandamus and dir. that the stay of further criminal proceedings is lifted, filed.				
May 17	26	DEFT'S APPLICATIONS for subpoena duces tecum filed. (re: Atlantic Perm. Fed. S & L; Albert C. Selkin, Esq.)				
June 3	27	DEFT'S MOTION to dismiss the Indict. filed		6-3-85	E	
June 3	28	MEMORANDUM in support of Motion to dismiss recd.				
June 3	29	NOTICE of Motion filed.				
June 4		COURT PROCEEDINGS (RGD, Judge) (C. Barnes, OCR) - U. S. appeared thru Ms. Sidney Powell, AUSA and Mr. Phillip Krajewski, AUSA. Deft. pres. with his counsel, Mr. John Drescher and Mr. James Lewis. Matter came on for trial by Jury. In Jury's absense, deft's motion to dismiss re Speedy Trial Act - arguments heard. Court ruled from Bench denying Motion to Dis. re Speedy Trial Act. After recess, Petit Jurors, deft. and Counsel appeared. Petit Jurors sworn and examined on their voir dire and from a panel pres., came a Jury to-wit: 1. Kathlynn P. Chance 7. Sylvia J. McAlister 2. H. Fred Butt, Jr. 8. Ernell B. Bowers 3. John L. Jordan 9. Evelyn B. Smith 4. Vernon T. White 10. Joy C. Harvey 5. Bette B. Agnew 11. Lula M. Artis 6. Aretta S. Lassiter 12. Brenda D. Freeman 13. Stephen J. Kruskaja - Alternate #1 14. Jean H. Jeyworth - Alternate #2 which was sworn to try the issue and a true verdict give. By agreement, witnesses excluded from Courtroom. Opening statements of counsel heard. Govt. pres. evidence in part. Jurors excused until tomorrow morning at 9:30 a.m., 6/5/85.		~~6-4-85~~	E	2
June 5		COURT PROCEEDINGS (RGD, Judge) (C. Barnes, OCR) - Petit Jurors, counsel and deft. appeared pur. to adjournment of last evening. Govt. resumed presentation of evidence in part. Jurors excused until tomorrow morning at 9:30 a.m. Court adjourned.				
June 6		COURT PROCEEDINGS (RGD, Judge) (C. Barnes, OCR) Petit Jurors, counsel and deft. appeared pur. to adjournment of last evening. Govt. resumed pres. of evidence. Govt. rested. On deft's motion for Judgment of Acquittal, the Court reserved ruling. Deft. pres. evidence. At Bench Conference in Jury's absence, deft's motion for mistrial was argued and denied by the Court. Deft. rested. In Jury's absence, deft renewed mot. for Judg. of Acquittal - Granted as to Count 2 and denied as to other counts. Jurors excused until 9:30 a.m. tomorrow morning. Court adjourned.				
June 7		COURT PROCEEDINGS (RGD, Judge) (C. Barnes, OCR) - Petit Jurors, counsel and deft. appeared pur. to adjournment of last evening. Final arguments of counsel heard. Jury recd. court's charge and retired to Jury Room to begin their deliberations. Alternate Jurors excused piror to Juror's retiring to Jury Room. (Counsel noted objection to Jury Charge). Sometime later Jury returned w/question - recd. court's instruction and continued their deliberations. Sometime later, Jury retd. w/the				
30		following verdict: "We, the Jury, find the defendant, ASHTON HARRIS PULLY, JR. AS TO COUNT 1.....Guilty; AS TO COUNT 3.... Not Guilty; AS TO COUNT 4 Guilty; AS TO COUNT 5....				

Interest | Start Date | Lv | Term

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES OF AMERICA	)	CRIMINAL ACTION NO. 84-4-N
v.	)	
ASHTON HARRIS PULLY JR.,	)	
Defendant	)	

ORDER

On June 5, 1984, this Court denied defendant's motion to dismiss the indictments in this action. Although defendant has not yet been tried, he has now lodged a notice of appeal of that decision.

Defendant attempts to characterize this appeal as one divesting this Court of jurisdiction, citing United States v. Blizzard, 493 F.Supp. 1084 (S.D. Ga. 1980). However, that case merely follows the rule established in Abney v. United

States, 431 U.S. 651 (1977), that a decision on a nonfrivolous claim of double jeopardy was immediately appealable.

Defendant has never been subjected to a criminal trial on the charges involved in this case, and he himself characterizes his motion to dismiss as having been based on lack of jurisdiction, res judicata, and collateral estoppel. Accordingly, this Court holds that its decision of June 5, 1984 was not a final decision under 28 U.S.C. § 1291, and is thus not appealable. This Court DECLINES to allow an appeal of this interlocutory order, and the notice of appeal will not be filed. Finally, defendant's motion to stay further proceedings pending appeal is DENIED.

It is so ORDERED.

United States District Judge

Norfolk, Virginia

June 14th, 1984

JWD/6204.8.C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES
OF AMERICA

CRIMINAL ACTION
NO. 84-4-N

v.

ASHTON HARRIS
PULLY JR.,

Defendant

ORDER

A hearing was held in this matter on July 6, 1984. To avoid any possibility of confusion, this Order supersedes and clarifies the oral rulings made at that time.

On June 5, 1984, this Court denied defendant's motion to dismiss the indictments in this action. Defendant next lodged a notice of appeal from that decision, as well as a motion for a stay of further proceedings. Defendant argued that his motion to dismiss had raised a defense of double

jeopardy, and was thus immediately appealable under United States v. Blizzard, 493 F.Supp. 1984 (S.D. Ga. 1980).

By Order of June 15, 1984, this Court ruled that defendant had not raised any double jeopardy defense, and thus the denial of his motion to dismiss was a non-appealable interlocutory decision. The notice of appeal was not filed, and the motion for a stay was denied.

Defendant next submitted a notice of appeal from the June 15, 1984 Order of this Court, as well as a second motion for a stay. At this point, the Clerk was directed to refuse this submission, because the notice and motion were not endorsed by defendant's counsel of record.

Upon further consideration, this Court now rules that defendant may pursue pro se his attempt to appeal from the denial of his motion to dismiss, and therefore his second notice of appeal

is ORDERED LODGED.

However, this Court adheres to its prior ruling that the June 5, 1984 denial of defendant's motion to dismiss was not a final order, and further holds that the Order of June 15, 1984 was not a final order. Thus neither decision is currently appealable, and neither notice of appeal will be filed.

Furthermore, this Court now explicitly rules that defendant's appeal ostensibly based on double jeopardy is frivolous. See, United States v. Head, 697 F.1d 1200 (4th Cir. 1982).

Defendant's motion to stay further proceedings is ORDERED FILED and is DENIED.

Finally, for the reasons stated at the July 6, 1984 hearing, the motion to withdraw as counsel by defendant's counsel Mr. Drescher and Mr. Lewis is DENIED.

It is so ORDERED.

United States District Judge

Norfolk, Virginia

July 6th, 1984

JWD/6204.9.C

PETITION FOR WRIT OF MANDAMUS

YOUR PETITIONER, ASHTON HARRIS PULLY, JR., respectfully sets forth the following Petition and Exhibits pursuant to Rule 21 FRAP, in support of his request for a writ of mandamus:

On June 5, 1984, your Petitioner presented pro se oral argument to a Judge of the United States District Court for the Eastern District of Virginia in support of your Petitioner's Motion to Dismiss Indictments based on res judicata (double jeopardy). The Motion was overruled ore tenus.

On June 13, 1984, your Petitioner filed his Notice of Appeal, with appropriate fees, to the decision of June 5, 1984, with the Clerk of the Court, and on June 14, 1984, a Judgment Order was entered as regards the Notice of Appeal pro se denying the Defendant his right of interlocutory appeal.

On June 15, 1984, your Petitioner lodged a

second Notice of Appeal pro se with the Clerk of the Court, specifying that your Petitioner desired to appeal only the question of res judicata.

Thereafter, the Clerk delivered the Notice of Appeal to the Judge. Thereafter your Petitioner was informed by a Deputy Clerk of the Court that the Appeal would not be filed pursuant to the direction of the Judge.

Thereafter your Petitioner lodged his Motion to Stay Further Proceedings, which was treated similarly to the Notice of Appeal.

The Notice of Appeal has not been filed although timely lodged by the Defendant, and the record has not been prepared or transmitted to the Court of Appeals.

The Defendant presented pleadings and argument to dismiss indictments based on double jeopardy, and having been overruled, attempted to appeal said decision. The issue is whether the Defendant

is entitled to an interlocutory appeal denying his defense of res judicata.

The Defendant seeks of this Court an Order directing the Judge of the United States District Court to file his Notice of Appeal based on Res Judicata; that the Clerk of the United States District Court prepare the record for appeal and transmit same to this Court for said approval; and that further proceedings be stayed pending a judgment by this Court on said appeal on the question of res judicata.

The Writ should issue based on the principle of law that when a Defendant raises the defense of res judicata and said defense is overruled by the District Court, and an appeal is timely filed on said question, that the Defendant is entitled to an interlocutory appeal as to that defense. In support of your Petitioner's request, the Defendant relies on U.S. v. Blizzard, 493 F.Supp. 1084 and

Abney v. U.S., 431 U.S. 651 (1977).

Your Petitioner submits herewith the following as Exhibits hereto (copies):

1. Pertinent portion of pleading asserting the defense of res judicata.

2. Transcript of pertinent proceedings of June 5, 1984.

3. Notice of Appeal filed June 13, 1984.

4. Judgment Order of June 14, 1984 (signatory of Judge deleted in keeping with Rule 14 of this Court).

5. Notice of Appeal lodged with the Clerk on June 15, 1984.

6. Motion to Stay Further Proceedings lodged with the Court.

ASHTON HARRIS PULLY, JR.,
Petitioner

1369 Laskin Road
Virginia Beach, Virginia 23451

JWD/6204.2.C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1721

In Re:

Ashton Harris Pully, Jr.,

Petitioner.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Chief District Judge. (C/A 84-4-N)

Argued: February 7, 1985 Decided: March 28, 1985

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

Ashton H. Pully, Jr., Petitioner pro se; Michael A. Cauley, Special Assistant United States Attorney (Elsie L. Munsell, United States Attorney; Raymond Jackson, Assistant United States Attorney on brief) for Respondent.

PER CURIAM:

Ashton H. Pully, Jr., petitions for a writ of mandamus directing the district court to file his notices of appeal. The district court denied Pully's motion to dismiss the indictment, which charges him with six counts of bankruptcy fraud. Pully's primary contention is that his attempted appeal from the district court's orders raises a non-frivolous double jeopardy claim and is, therefore, immediately appealable under Abney v.United States, 431 U.S. 651 (1977). Upon consideration of the record, briefs, and oral argument, we find Pully's contentions to be frivolous and deny his petition on the reasoning of the district court. United States v. Pully, Crim. Action No. 84-4-N (E.D. Va. June 15 and July 6, 1984). Accordingly, the stay of further criminal proceedings against Pully is lifted.

DENIED

WIDENER, Circuit Judge, concurring:

I concur in the result as well as in the opinion, but I would add that I do not understand that we consider Pulley's appeal to be frivolous because his legal theory of defense to the indictment (akin to collateral estoppel) is without any rational or arguable legal base to support it. Rather, the appeal is frivolous because the civil proceeding which he claims should bar his criminal prosecution did not place him in jeopardy. Thus, intimating no opinion as to its validity, the defense may be asserted in Pulley's criminal trial. See Abney, p. 668.

JWD/6204.4.C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
v.	)	
	)	NO. 84-4-N
ASHTON HARRIS PULLY, JR.	)	

Proceedings had and evidence taken in the above-entitled cause on the 4th day of June, 1985, at 10:06 a.m., in the United States District Court for the Eastern District of Virginia, Norfolk Division, at Norfolk, Virginia, before the Honorable Robert G. Doumar, United States District Judge, and a jury.

MR. DRESCHER: -- the statute is there for a specific purpose, and --

THE COURT: You are here because the act provides for a certain amount of days, and you are making your motion, and I'm not faulting you, and if you're right then the Court of Appeals is going to be the one that's going to have to dismiss it.

I'm not going to dismiss it

They granted the stay. They granted it to not a fixed date. Therefore, it had to be returned and reset for trial.

It's not like a continuance. A continuance is granted to a specified date. They granted a stay, which doesn't fit into a continuance until the further order of their court. Once they lifted the stay, they didn't order what day it would be tried.

But they are the ones that granted the stay. They brought about the situation, which was

requested by the defendant. So, any problems about whether it's more than 45 days from the date it was initially set, which is pretty speedy in a complex matter such as this, — and it is complex --

I think the equities are with the government. I'm not going to impose any sanctions even if there weren't a speedy trial, but I find that the delay occasioned by the proceedings is an excusable delay under any circumstances.

I'm ruling against the motion.

Now, do you have some other motions you would like to take up in limine?

MR. DRESCHER: No, sir.

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UNITED STATES DISTRICT COURT for
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Docket No. CR. 84-4-N

United States of America vs.

DEFENDANT ASHTON HARRIS PULLY, JR.

JUDGMENT AND PROBATION COMMITMENT ORDER
AO-245 (9/82)

In the presence of the attorney
for the government the defendant Month/Day/Year
appeared in person on this date----July 11, 1985

COUNSEL___ without counsel However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ with counsel John Drescher and James Lewis
Name of Counsel

PLEA ___ GUILTY, and the court being satisfied that there is a factual basis for the plea,

___ NOLO CONTENDERE,

_X_ NOT GUILTY.

FINDING AND JUDGMENT

There being a verdict of

X NOT GUILTY as to Count 3, Defendant is discharged.

X GUILTY as to Counts 1, 4, 5, and 6 Defendant has been convicted as charged of the offense(s) of violation of Title 18 USC Section 152 - Bankruptcy Fraud

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

AS TO COUNT 1: The defendant is sentenced to FIVE (5) YEARS and is hereby committed to the custody of the Attorney General or his authorized representative for confinement in a jail-type institution for a period of ONE HUNDRED SEVENTY NINE (179) DAYS. Execution of remainder of said jail sentence suspended and defendant placed on PROBATION for FIVE (5) YEARS, usual conditions. FURTHER, defendant is directed to perform SIXTEEN (16) HOURS of community service each month for THREE (3) YEARS, without compensation.

FURTHER, defendant is to pay a FINE of FIVE THOUSAND ($5,000.00) DOLLARS.

SPECIAL CONDITIONS OF PROBATION

AS TO EACH OF COUNTS 4, 5, and 6: Defendant is sentenced to FIVE (5) YEARS on each count and is hereby committed to the custody of the Attorney General or his authorized representative for a period of ONE HUNDRED SEVENTY NINE (179) DAYS. Execution of remainder of said jail sentence suspended and defendant is placed on PROBATION for FIVE (5) YEARS, usual conditions. FURTHER, defendant is directed to perform SIXTEEN (16) HOURS of community service each month for THREE (3) YEARS, without compensation. FURTHER, defendant to pay a FINE of ONE THOUSAND ($1,000.00) DOLLARS on each count. Sentence to imprisonment and community service imposed as to Counts 4, 5, and 6, to run concurrently with sentence imposed as to Count 1.

(TOTAL SENTENCE: 20 years; TOTAL PERIOD OF CONFINEMENT 179 days; TOTAL FINE: $8,000.00)

NOTE: Judgment of Acquittal granted as to Count 2 on June 6, 1985.

Defendant continued on present bond and is directed to report to

designated place of confinement on Monday, August 5, 1985, by 12:00 noon.

(Notice of Appeal received and filed in Open Court. Court continued defendant on present bond pending outcome of appeal.)

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by
X U.S. District Judge /s/ Robert G. Doumar
___ U.S. Magistrate Robert G. Doumar
Date 7-11-85

A TRUE COPY, TESTE:
W. Farley Powers, Jr.,
Clerk

By_____
Deputy

JWD/6204.6.C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5178

United States of America,

Appellee,

Versus

Ashton Harris Pully, Jr.,

Appellant.

Appeal from the United States District Court for the District of Virginia, at Norfolk. Robert G. Doumar, District Judge.
(CR-84-4-N)

Argued: January 6, 1986 Decided: April 2, 1986

Before WINTER, Chief Judge and SPROUSE and CHAPMAN, Circuit Judges.

John W. Drescher (James C. Lewis; Pickett, Lyle, Siegel, Drescher & Croshaw, P.C. on brief) for Appellant; Sidney Powell, Assistant United States Attorney (Elsie L. Munsell, United States Attorney on brief) for Appellee.

CHAPMAN, Circuit Judge:

Appellant Pully was a practicing attorney on January 9, 1984, when he was indicted by the grand jury of the Eastern District of Virginia on six counts of bankruptcy fraud. Count 1 charged that Pully had fraudulently concealed and failed to disclose his interest in several pieces of real estate. Count 2 charged him with a fraudulent conveyance of real estate in contemplation of bankruptcy. Counts 3 through 6 charged Pully with knowingly and fraudulently making material false statements under penalty of prejury as to matters relating to his bankruptcy case.

Immediately upon return of the indictment, appellant undertook a convoluted course of conduct designed to delay the trial of his case. As a result, he was not brought to trial until July 17, 1985, at which time he was convicted of all counts except Count 3, upon which the court granted a

directed verdict of acquittal.

He appeals his convictions and claims that the delay of the trial violated the Speedy Trial Act, 18 U.S.C. § 3161 et seq. (1982); that the fourth, fifth, and sixth counts of the indictment were multiplicious; that the trial judge erred in explaining "an equitable interest" to the jury; and that the trial court erred in admitting into evidence certain information from defendant's income tax return. Finding no error, we affirm.

I

Pully filed for personal bankruptcy in the Eastern District of Virginia on October 26, 1979. As a result, he filled out the Statement of Financial Affairs accompanying the bankruptcy petition. In this statement he was required to disclose all assets and liabilities. The statement must be signed and sworn to under penalty of perjury. It is not necessary to go into great

detail as to the concealments and false statements, since there is no claim that the evidence was not sufficient to prove guilt beyond a reasonable doubt. However, the evidence shows that appellant did not disclose his interest in a $5,000 certificate of deposit at a Virginia bank, his interest in a $10,000 certificate of deposit that he held as trustee for his mother, and his interest in a 1974 Datsun sports car. Also, he titled assets in the names of other persons to avoid creditors, but continued to use and enjoy the assets.

Following the indictment, appellant's attorneys made a motion to dismiss Counts 3, 4, 5, and 6 as being multiplicious and made motions for discovery and inspection. Following briefing and oral argument, the motion to dismiss was denied. On March 19, 1984, following a hearing required by Federal Rule of Criminal Procedure 11, the

appellant entered a plea of guilty to Count 2 of the indictment pursuant to an agreement whereby the remaining counts in the indictment would be dismissed. On June 5, 1984, prior to being sentenced, the appellant, acting pro se, filed a motion to withdraw his plea of guilty, claiming that he had entered his plea involuntarily and under duress because of the strain resulting from his concern for his mother's health. He also claimed that he had defenses to the counts in the indictment. On the same date, he filed a motion to dismiss the indictments based upon lack of jurisdiction, res judicata, and collateral estoppel. Pully argued his own motions. The motion to withdraw the plea was granted, and the motion to dismiss was denied.

The case was set for trial on July 17, 1984. On June 13, 1984, appellant, acting pro se, filed a notice of appeal from the court's order denying

the motion to dismiss and a motion to stay further proceedings pending the appeal. He challenged the jurisdiction of the district court, and the court entered an order June 15, 1984, declining to allow an appeal of the interlocutory order denying dismissal. On June 15, 1984, still acting pro se, Pully filed a second notice of appeal and another motion to stay the proceedings.

By this time his original attorneys were seeking to withdraw as counsel, but this motion was denied by district court order of July 6, 1984. In the same order, the court denied the motion to stay but stated: "Upon further consideration, this court now rules that defendant may pursue pro se his attempt to appeal from denial of his motion to dismiss, and therefore his second notice of appeal is ordered lodged." On July 6, 1984, appellant filed with our court a petition for a writ of mandamus, claiming that his

defense of res judicata justified an interlocutory appeal. He asked that the district judge be directed to file his notices of appeal and allow an interlocutory appeal. On July 13, 1984, our court stayed the criminal trial until further order of the Court of Appeals and directed the United States to respond to the application for the writ of mandamus. A three-judge panel heard argument on the petition for the writ of mandamus in Richmond, Virginia, on February 7, 1985, and issued an opinion on March 28, 1985, denying the petition and lifting the stay of the criminal proceeding. On April 12, 1985, Pully, acting pro se, moved to stay the mandate of our court pending application for writ of certiorari to the Supreme Court. This motion was denied on April 17, 1985, and the mandate issued April 19, 1985.

On June 3, 1985, appellant moved to dismiss the indictment, claiming violation of the Speedy

Trial Act. On June 4, 1985, the trial commenced, and on June 7, 1985, the defendant was convicted by the jury on five of the six counts.

II

Title 18 U.S.C. §3161(i) provides:

> If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

Any time that elapsed between the date of the indictment, January 9, 1984, and the date the district court allowed Pully to withdraw his plea of guilty, June 5, 1984, is no longer in the picture for the purposes of computing time under the Speedy Trial Act.

The time between the defendant's change of his plea on June 5, 1984, and the filing of his motion

to dismiss and motion to stay on June 13, 1984, would not be excluded under the Speedy Trial Act. The trial judge ruled on these motions on June 15, 1984, and the two days between June 13 and June 15 are excludable, both under § 3161(h)(1)(J), which covers "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court," and under § 3161(h)(1)(F), "delay resulting from the pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."

On the same date, defendant filed another appeal and another motion to stay. The district judge had the motion under advisement until his order of July 6, 1984, and this time is excludable under § 3161(h)(1)(J).

Pully immediately filed a petition for a writ

of mandamus, which was in actuality an interlocutory appeal because he was claiming that his attempted appeal from the district court's order raised a non-frivolous double jeopardy claim and was immediately appealable. The trial of the criminal case was stayed by the Court of Appeals by order dated July 13, 1984. This petition for a writ of mandamus was briefed and orally argued before a three-judge panel of this court and resulted in a written opinion. The mandate came down on April 19, 1985. The time between Pully's petition for a writ of mandamus and the filing of the mandate is excluded as an interlocutory appeal under § 3161(h)(1)(E).

Pully claimed in his writ of mandamus that the denial of his motion to dismiss on double jeopardy grounds was immediately appealable under Abney v. United States, 431 U.S. 651 (1977). Therefore, the request for mandamus was in effect an interlo-

cutory decree and subject to exclusion under § 3161(h)(1)(E).

The trial of the case commenced within 55 days following the mandate of this court. The total time not excluded, 58 days, was well within the 70-day requirement of the Speedy Trial Act. Every delay in this case was occasioned by an act of defendant. In the past we have refused to adopt an illogical approach in counting time under the Speedy Trial Act. In United States v. Black, 733 F.2d 349, 351 (4th Cir. 1984), we stated: "When drafting the Speedy Trial Act, Congress recognized that in processing criminal cases a mechanical adherence to time limits would not serve the interests of the defendant, the government, the courts, or society."

III

Pully contends that the indictment is multiplicious and argues that Count 1, which

charges fraudulent concealment from the trustee in bankruptcy and from the creditors of certain property belonging to the bankrupt estate, duplicates the charges contained in Counts 4, 5, and 6, which allege that Pully made false statements under penalty of prejury in relation to his case in the bankruptcy court by failing to list certain items of property in which he had an interest.

Appellant urges us to adopt the reasoning of United States v. Ambrosiana, 610 F.2d 65 (1st Cir. 1979), cert. denied, 445 U.S. 930 (1980), which found that if the making of a false oath also constituted concealment, there was double punishment for the same act, and therefore the indictment was multiplicious.

All of the counts in question were brought under paragraphs 1 or 3 of 18 U.S.C. § 152 (1982). Count 1 of the indictment was brought under the first paragraph of § 152, and Counts 4, 5, and 6 were brought under the third paragraph:

> [1] Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of the debtor; or
>
> [3] Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 o[f] title 28, United States Code, in or in relation to any case under title 11:
>
> * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The separate paragraphs of § 152 create separate crimes, the violation of which may be indicted separately. United States v. Gordon, 379 F.2d 788, 790 (2d Cir.), cert. denied, 389 U.S. 927 (1967). "Title 18 U.S.C. § 152 creates eight separate offenses in its eight paragraphs." United States v. Arge, 418 F.2d 721, 723 (10th Cir. 1969). We find Gordon and Arge more per-

suasive. It is apparent from reading § 152 that Congress intended to create separate offenses for each paragraph in the section.

Pully also argues that since the filing of the "Statement of Financial Affairs" was only a single act, it could not support four separate counts in the indictment. These are the false swearing counts (3, 4, 5, and 6) and require that the statements be made under penalty of perjury. Each false answer will support a separate count of perjury if each question sought information relating to a different aspect of the investigation. United States v. Nixon, 634 F.2d 306, 313 (5th Cir.), cert. denied, 454 U.S. 828 (1981). The false statements alleged in Counts 4, 5, and 6 related to different types of property. Count 4 covered automobiles or other vehicles in which he had an interest, and Count 6 covered property that

he held for another person.[1/] Each count would require the proof of a false material statement, made under penalty of perjury, as to the particular type of property named in the count. Two offenses may be properly charged if each offense requires proof of a different element. Blockburger v. United States, 284 U.S. 299 (1932). Here, that test was met.

IV

Appellant contends that the trial judge erred in his jury instruction defining "equitable interest." Pully contended that he had no "interest" in the 1974 sports car placed in the name of his girl friend. He also contended that the Bankruptcy Code contained no definition of "interest". To follow the appellant's reasoning, the trial judge would have had to leave the jury

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1/ The trial judge granted a motion for judgment of acquittal on Count 3.

uninstructed as to an important point under the fifth count of the indictment, which required Pully to list and describe any automobiles or other vehicles in which he had an interest. The court gave a proper charge on an equitable interest. The jury needed such a charge to decide the issue.

V

Pully claims error in the admission of the testimony of a certified public accountant, based on the business records that Pully submitted to him when he prepared Pully's 1978 income tax return, that Pully claimed an interest deduction for the loan on the 1974 Datsun sports car registered in the name of his girl friend. The admission of evidence is committed to the discretion of the court, and we do not find this discretion to have been abused. The evidence was cumulative since the prosecution had already

established that the loan for the car was in Pully's name alone, that he drove the car every day, that he made all payments on the loan, and that he paid no rent for the automobile.

Finding no error the judgment is

AFFIRMED.

JWD/6204.7.C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-5178

United States of America,

Appellee,

versus

Ashton Harris Pully, Jr.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehear-

ing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Chief Judge Winter and Judge Sprouse.

For the Court,

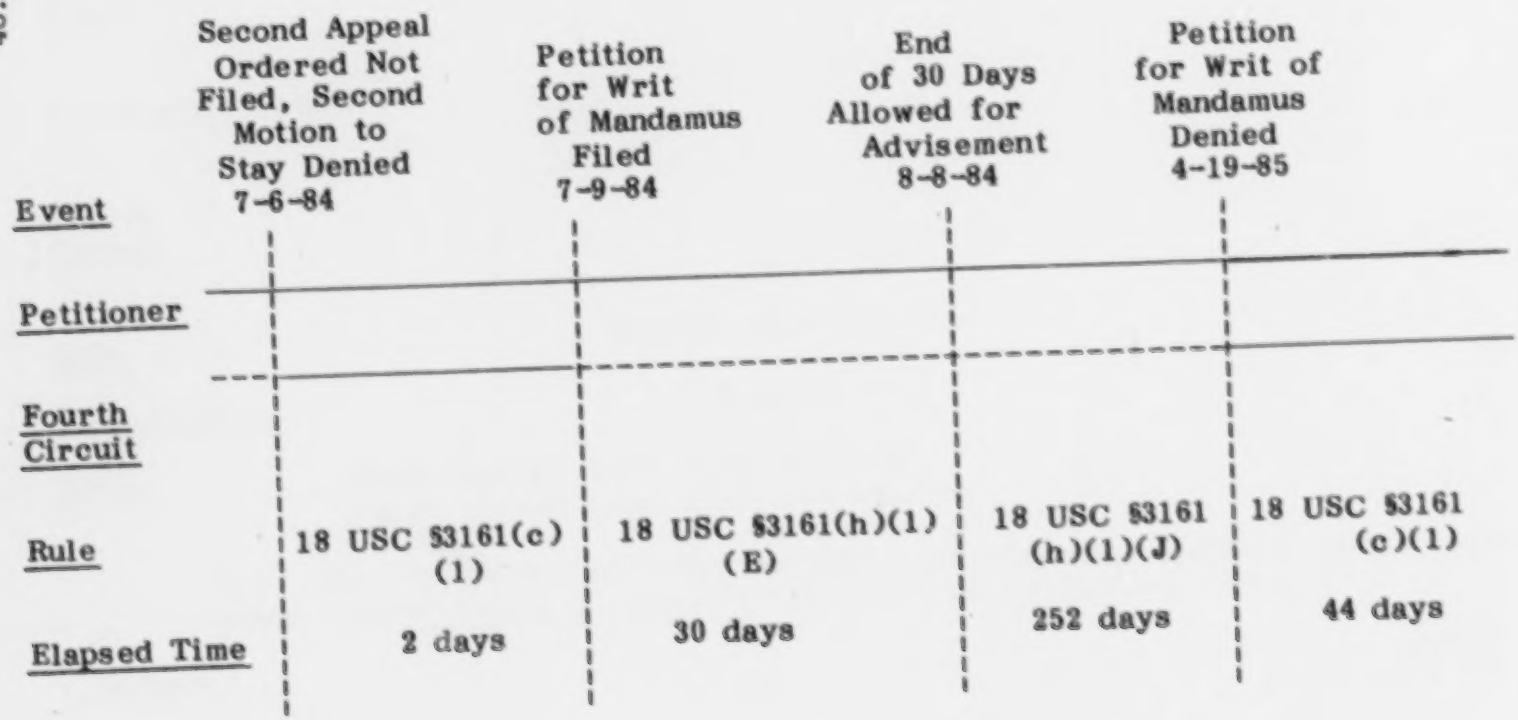
_____

CLERK

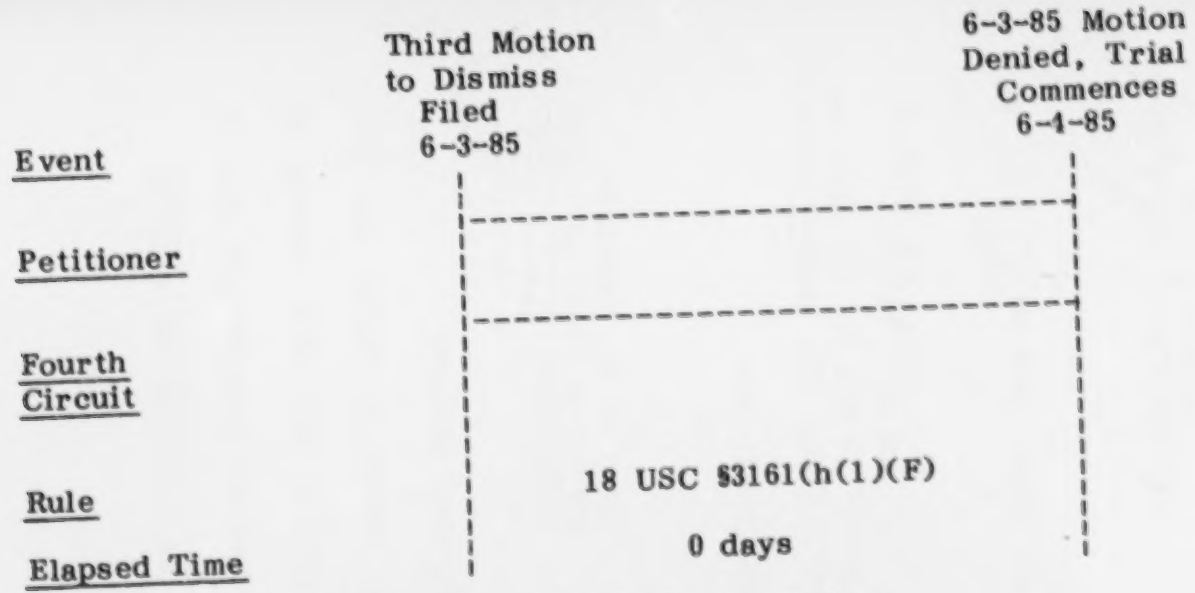
JWD/6204.5.C

Speedy Trial Chronology

Event	Indictment 1-9-84	Motion to Withdraw Guilty Plea Granted 6-5-84	Motion to Stay and Notice of Appeal Lodged 6-14-84	6-14-84 Motion and Notice Denied, Second Notice of Appeal Submitted 6-15-84
Petitioner				
Fourth Circuit				
Rule	18 USC §3161(i)	18 USC §3161(c)(1)	18 USC §3161 (h)(1)(F) & (h)(1)(J)	18 USC §3161 (h)(1)(F) & (h)(1)(J)
Elapsed Time	147 days	8 days	1 day	20 days


Second Appeal Ordered Not Filed, Second Motion to Stay Denied 7-6-84
Petition for Writ of Mandamus Filed 7-9-84
End of 30 Days Allowed for Advisement 8-8-84
Petition for Writ of Mandamus Denied 4-19-85
Event
Petitioner
Fourth Circuit
Rule
18 USC §3161(c)(1)
18 USC §3161(h)(1)(E)
18 USC §3161(h)(1)(J)
18 USC §3161(c)(1)
Elapsed Time
2 days
30 days
252 days
44 days

49.



Notes: _____ Means speedy trial clock running
_ _ _ _ Means speedy trial clock not running

Both day of filing pretrial motions and day of decision are excludable, United States v. Pirolli, 742 F.2d 1382 (11th Cir. 1984).

LAW/6204.1.C

NOTARIZED STATEMENT OF MAILING

I hereby certify that the Petition for Writ of Certiorari attached hereto was duly mailed on July 25TH, 1986, which is within the time permitted for filing of such petition.

Joseph L. Lyle, Jr., Esq.
for John W. Drescher

STATE OF VIRGINIA
CITY OF VIRGINIA BEACH, to-wit:

The foregoing instrument was acknowledged before me, a Notary Public in and for the City and State aforesaid, this 25TH day of July, 1986, by Joseph L. Lyle, Jr., Esq. for John W. Drescher.

GIVEN under my hand this 25TH day of July, 1986.

Notary Public

My Commission Expires: 9-23-88

JWD/6204.10.C

Supreme Court, U.S.
FILED
NOV 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-121

In the Supreme Court of the United States

OCTOBER TERM, 1986

ASHTON HARRIS PULLY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Abney v. *United States*, 431 U.S. 651 4

United States v. *Cannon*, 715 F.2d 1228, cert. denied, 464 U.S. 1045 5

United States v. *Claiborne*, 727 F.2d 842, cert. denied, 469 U.S. 829 6

United States v. *Dunbar*, 611 F.2d 985, cert. denied, 447 U.S. 926 6

United States v. *Garbinski*, 674 F.2d 677, cert. denied, 459 U.S. 829 5

United States v. *Hastings*, 681 F.2d 706, cert. denied, 459 U.S. 1203 5

United States v. *Hines*, 689 F.2d 934 5

United States v. *Lanci*, 669 F.2d 391, cert. denied, 457 U.S. 1134 5-6

United States v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986) 4

United States v. *McQuilkin*, 673 F.2d 681 5

United States v. *Studnicka*, 777 F.2d 652 4

Statutes:

Speedy Trail Act, 18 U.S.C. 3161 *et seq.* 1

18 U.S.C. 3161(c)(1) 3

18 U.S.C. 3161(h) 4

18 U.S.C. 3161(h)(1) 4

18 U.S.C. 3161(h)(1)(A)-(J) 4

Page

Statutes—Continued:

18 U.S.C. 3161(h)(1)(E) 4
18 U.S.C. 3161(h)(1)(F) 3, 5
18 U.S.C. 3161(h)(1)(J) 3, 5
18 U.S.C. 3161(i) 3
18 U.S.C. 352 1

Miscellaneous:

Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* (rev. Dec. 1979, with amendments through Oct. 1984) 4

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-121

ASHTON HARRIS PULLY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below committed several violations of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

1. Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on four counts of bankruptcy fraud, in violation of 18 U.S.C. 352. He received concurrent five-year sentences on each count, with all but 179 days suspended in favor of five years' probation. He also was fined $8,000. The court of appeals affirmed (Pet. App. 28-44).

The evidence at trial established that petitioner failed to disclose his assets when he filed for personal bankruptcy (Pet. App. 30-31). He was indicted on January 9, 1984, and pleaded guilty on March 19, 1984 (*id.* at 29, 31-32). On June 5, 1984, however, petitioner sought to withdraw his guilty

plea and filed a motion to dismiss the indictment. The district court permitted withdrawal of the plea but denied the motion to dismiss. *Id.* at 32. Trial was scheduled for July 17, 1984.

On June 13, 1984, petitioner filed a notice of appeal from the court's order denying the motion to dismiss and moved the district court to stay further proceedings pending appeal. Two days later, the district court refused to stay the trial and declined to allow an interlocutory appeal of the denial of the motion to dismiss. That same day, June 15, 1984, petitioner offered another notice of appeal; on June 29, 1984, he again asked the court to stay proceedings. On July 6, 1984, the district court reiterated its view that the order denying the motion to dismiss was not appealable, although the court authorized petitioner to pursue his attempt to appeal pro se. Pet. App. 9-10, 32-33.

On July 9, 1984, petitioner filed a petition for a writ of mandamus in the court of appeals, arguing that a res judicata claim raised in his motion to dismiss involved a double jeopardy issue that could be pursued in an interlocutory appeal. On July 13, 1984, the court of appeals stayed petitioner's trial and directed the United States to respond to the mandamus petition. The court of appeals heard argument on the issue on February 7, 1985. On March 28, 1985, the court of appeals found petitioner's double jeopardy contention frivolous, denied the mandamus petition, and lifted the stay of the trial proceedings. Petitioner then moved to stay the mandate while he sought a writ of certiorari from this Court; the court of appeals denied the motion on April 17, 1985, and issued its mandate on April 19, 1985. Trial began on June 4, 1985. Pet. App. 33-36.

2. In an unpublished opinion, the court of appeals rejected petitioner's contention that his rights under the Speedy Trial Act had been violated. While the Act generally

provides that trial must begin within 70 days of indictment (see 18 U.S.C. 3161(c)((1)), the court explained that, under 18 U.S.C. 3161(i), the 70-day period began running in this case on the date that petitioner withdrew his guilty plea. Pet. App. 35. The court then held that June 13 and 14, when petitioner's first request for a stay was pending, were excludable from the 70-day calculation as delay resulting from the district court's consideration of a pretrial motion (see 18 U.S.C. 3161(h)(1)(F) and (J)) (Pet. App. 36). For the same reason, the court excluded the period from June 15 through July 6, which extended from the filing of petitioner's second notice of appeal through the district court's determination that the appeal was frivolous (*ibid.*).

The court also held that the period between July 6, 1984, when petitioner sought a stay from the court of appeals prior to seeking a writ of mandamus, and April 19, 1985, when the mandate issued on the court of appeals' denial of the petition, was excludable "as an interlocutory appeal under [18 U.S.C.] § 3161(h)(1)(E)" (Pet. App. 37). The court explained that the petition "was in actuality an interlocutory appeal because [petitioner] was claiming that his attempted appeal from the district court's order raised a non-frivolous double jeopardy claim and was immediately appealable" (*ibid.*) Because only 55 days of nonexcludable time had elapsed between the withdrawal of petitioner's plea and the start of trial (June 5-13, 1984, and April 19-June 4, 1985), the court of appeals held that the requirements of the Act had been satisfied (*id.* at 38).

3. Petitioner's principal contention—that the time consumed in disposing of his petition for mandamus is not excludable from the 70-day Speedy Trial Act indictment-to-trial limit (Pet. 17-20)—is without merit. That 70-day period is not counted in consecutive calendar days. Instead, the Act by its terms excludes from the 70-day computation "(1) [a]ny period of delay resulting from other proceedings

concerning the defendant, including but not limited to— * * * (E) delay resulting from any interlocutory appeal." 18 U.S.C. 3161(h). As the court of appeals explained, petitioner's request for mandamus "was in actuality an interlocutory appeal" because it contended that the denial of his motion to dismiss was immediately appealable under *Abney* v. *United States*, 431 U.S. 651 (1977) (Pet. App. 37). That request therefore created delay that is excludable under Section 3161(h)(1)(E).

Moreover, even if petitioner is correct in his contention that the time taken to dispose of a petition for mandamus does not fall within the literal language of Section 3161(h)(1)(E), that period plainly is a "period of delay resulting from other proceedings concerning the defendant." The period therefore is excludable under the catch-all introductory language of Section 3161(h)(1). That general exclusion is, by its terms, "not limited to" delay resulting from the particular types of proceedings (such as interlocutory appeals) listed in Subections (A)-(J). See S. Rep. 96-212, 96th Cong., 1st Sess. 10 (1979). The Judicial Conference, in its authoritative interpretation of the Act, has thus concluded that, "[a]lthough an application for an extraordinary writ is not, strictly speaking, an 'interlocutory appeal,' it is an analogous 'other proceeding' excludable under paragraph [3161](h)(1)." Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 34 (rev. Dec. 1979, with amendments through Oct. 1984).[1]

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[1]The purpose of the Act plainly would be frustrated were this not the case. By obtaining a stay of the trial from the court of appeals, petitioner made it impossible for the district court to try the case expeditiously. Having done that, petitioner should be foreclosed from winning dismissal of his indictment by claiming that he was not tried in a timely fashion. Cf. *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 14; *United States* v. *Studnicka*, 777 F.2d 652, 658 (11th Cir. 1985).

Petitioner's remaining contention (Pet. 12-16) is that the periods of June 13-14, 1984, and June 15-July 6, 1984, are not excludable. Petitioner acknowledges that periods of delay resulting from the filing of a pretrial motion and from the court's consideration of any "proceeding concerning the defendant" (up to a maximum of 30 days) are excludable under 18 U.S.C. 3161(h)(1)(F) and 3161(h)(1)(J), respectively. He insists, however, that his notices of appeal and motions to stay proceedings were "lodged" rather than "filed" and therefore did not trigger Section 3161(h)(1)(F); he also asserts that the district court did not actually have the notices or motions under advisement, so that the Section 3161(h)(1)(J) exclusion is inapplicable.

These contentions are frivolous. The suggestion that the district court never took the motions under advisement is belied by the manner in which it disposed of them: the court resolved both motions in timely written orders that addressed the substance of petitioner's requests. See Pet. App. 6-7, 8-10. Indeed, the court was obligated to give meaningful consideration to the motions for a stay and accompanying notices of appeal because the appeals, unless frivolous, would have ousted the court of jurisdiction to proceed with the case. When a pretrial notice of appeal is filed that asserts a double jeopardy claim, the district judge cannot continue with pretrial proceedings or commence the trial until he determines that the appeal is frivolous; the court is essentially divested of jurisdiction over the case during that period.[2] The district court thus was obligated to

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[2]See, *e.g.*, *United States* v. *Cannon*, 715 F.2d 1228, 1231 (7th Cir. 1983), cert. denied, 464 U.S. 1045 (1984); *United States* v. *Hines*, 689 F.2d 934, 936-938 (10th Cir. 1982); *United States* v. *Hastings*, 681 F.2d 706, 709 n.4 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); *United States* v. *Grabinski*, 674 F.2d 677, 679-680 (8th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982); *United States* v. *McQuilkin*, 673 F.2d 681, 687 (3d Cir. 1982); *United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.),

consider the import of the notices of appeal and to find the appeals frivolous—a finding that the court made explicitly on July 6, 1984 (Pet. App. 10)—before proceeding with the case.[3] The entire period of June 13-July 6, 1984, therefore is excludable under Section 3161(h)(1)(J) as delay "attributable to any period * * * during which any proceeding concerning the defendant is actually under advisement," as well as under Section 3161(h)(1)(E) as delay resulting from an interlocutory appeal.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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cert. denied, 457 U.S. 1134 (1982); *United States* v. *Dunbar*, 611 F.2d 985, 986, 988-989 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980). Cf. *United States* v. *Claiborne*, 727 F.2d 842, 850-851 (9th Cir.), cert. denied, 469 U.S. 829 (1984).

[3]Petitioner maintains (Pet. 14-16) that his second notice of appeal was "lodged" rather than "filed." This distinction is without substance. In referring to the notice as being "lodged," the district court plainly meant to indicate only that, in its view, petitioner's motion to dismiss the indictment was not appealable (see Pet. App. 10). The court of appeals thus treated the notice of appeal as having been filed (*id.* at 32-33, 36).

[4]This conclusion is unaffected by some confusion in the court of appeals' opinion about the filing date of petitioner's second motion to stay proceedings. The court of appeals assumed that the motion was filed on June 15, along with petitioner's second notice of appeal (see Pet. App. 36); it appears, instead, to have been filed on June 29, 1984 (see *id.* at 12-13). The discrepancy is immaterial, however, because the filing of the notice of appeal itself excluded the period following June 15.

DOJ-1986-11